202

CF0000060235

Cr A 2579/98 (2)

S.T. No. 29/98

APPEAL PRISONER

No. 87/98 Name मङ्कामी देवा

Father's Name भीमा Resident तांगातोला पारा थाना कुरूद (छत्त)

Age 40 वर्ष Sentenced to आजीवनकारावास + 1000/- Fine on 21/7/98

Under Section 302/34 भादवि by द्वितीय सत्र न्यायालय जगदलपुर (छत्त)

It is explained to the prisoner that if he states or wishes to be represented by a legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears If the legal practitioner does not appear within seven days he may be heard at all if legal practitioner the court may proceed at once with the case and will not be obliged to give a bearing to any legal practitioner who should appear.

1. Date of application for copy of Judgement :-
2. Date of which copy received :- 21/7/98
3. Date on which appeal sent :- 7/8/98
4. Whether the prisoner wished to be represented or not :- Yes / No.

No. 87/98 Name मड़कामी देवा S/o भीमा

Continued in केन्द्रीय Jail जगदलपुर

No. 364/अपराध/98 Dated 2/8/98

Forwarded to the CHIEF JUDICIAL MAGISTRATE जगदलपुर छत्त (म.प्र.) together with a copy of Judgement or order passed in the case for favour of transmission to the proper Applleate Court.

अधीक्षक
Su perintendent, Central / Distt. / Sub-Jail.

Date of receipt in C. J. M. Office. 7/8/98

Date of receipt of record to accompany.

Memo of Appeal of the Appellate Court.

No. 27 dated 10-8-98

Forwarded to the माननीय सत्र न्यायाधीश महोदय, जगदलपुर

एच.सी. श्रीवास्तव
मुख्य न्यायिक मजिस्ट्रेट, जगदलपुर
C. R. MAGISTRATE
मुख्य न्यायिक मजिस्ट्रेट, जगदलपुर

Date of receipt in Applieate Court

(15)

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

(DIVISION BENCH)

Criminal Appeal No.2576 of 1998

Madkami Gangi

- Versus -

State of Chhattisgarh

Criminal Appeal No.2577 of 1998

Madkami Hunga alias Benda

- Versus -

State of Chhattisgarh

Criminal Appeal No.2578 of 1998

Madkami Hidma

- Versus -

State of Chhattisgarh

AND

Criminal Appeal No.2579 of 1998

Madkami Deva

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-

J U D G E
10.9.2004

HON'BLE THE CHIEF JUSTICE

Sd/-
Chief Justice

POST FOR JUDGMENT ON 14TH SEPTEMBER, 2004

Sd/-
L.C. Bhadoo
Judge

(16)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

(DIVISION BENCH)

CORAM: -

HON'BLE MR. A.S.V. MOORTHY, C.J.

AND HON'BLE MR. L.C. BHADOO, J.

Criminal Appeal No.2576 of 1998

Madkami Gangi

- Versus -

State of Chhattisgarh

Criminal Appeal No.2577 of 1998

Madkami Hunga alias Benda

- Versus -

State of Chhattisgarh

Criminal Appeal No.2578 of 1998

Madkami Hidma

- Versus -

State of Chhattisgarh

AND

Criminal Appeal No.2579 of 1998

Madkami Deva

- Versus -

State of Chhattisgarh

Present: -

Mr. R.K. Jain, Advocate:	For the appellants in Criminal Appeal Nos.2576/1998 and 2578/1998.
Mr. D.R. Sharma, Advocate:	For the appellant in Cr.A.No.2577/1998.
Miss Sofia Khan, Advocate:	For the appellant in Cr.A.No.2579/1998.
Mr. Ashish Shukla, Govt. Advocate:	For the State/respondent.

J U D G M E N T

(Delivered on 14th September, 2004)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J***: -

1. Criminal Appeal No.2576/1998 filed by Madkami Gangi, Criminal Appeal No.2577/1998 filed by Madkami Hunga alias Benda, Criminal Appeal No.2578/1998 filed by Madkami Hidma, and Criminal Appeal No.2579/1998 filed by Madkami Deva are arising out of the same judgment dated 21.7.1998 passed in Sessions Trial No.29/1998 and relating to the same incident, therefore, they are being disposed of by this common judgment.

2. The accused/appellants have preferred these criminal appeals under Section 374 (2) of the Code of Criminal Procedure being aggrieved by the judgment of conviction and sentence dated 21.7.1998 passed by the 2nd Additional Sessions Judge, Jagdalpur, in Sessions Trial No.29/1998, whereby the learned Additional Sessions Judge after holding the accused/appellants guilty under Section 302 read with Section 34 of the I.P.C., sentenced each of them to undergo imprisonment for life and pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for one year.

3. The factual scenario of the prosecution case is that on 4.10.1997 at about 2.05 p.m. Muchaki Budra gave merg intimation to Police Station: Kukanar to the effect that on 3.10.1997 (Friday) when he reached to his house at Village: Tangar Rash from Rajamunda, he saw that Hadma was not at residence, therefore, he enquired about his whereabouts and on enquiry he was informed by Hidma & Aayta that at about 5 p.m. Hadma has been murdered by accused Deva, Benda, Joga alias Dallam, Gangi & Hidma by assaulting with axe & Lathi in connection with land dispute. There are injuries at 6-7 places on the body of Hadma, which are caused by axe, and lot of blood has come out from the injureis, which is spread over the earth. On receiving this intimation (Ex.P-2), F.I.R. (Ex.P-1) was registered by Sub Inspector Anurag Pandey, thereafter, he took up the investigation. The Investigating Officer took into possession the weapon of offence (axe) vide seizure memo Ex.P-3 on being produced by accused Madkami Deva. He also took into possession one axe and one knife vide Ex.P-4 on being produced by accused Madkami Hunga @ Benda. The body of Madkami Hadma was sent for post-mortem to Additional Primary Health Centre, Indjepal, where Dr. S.S. Tekam, Assistant Surgeon, conducted the post-mortem on the

body of Madkami Hadma, and he found as many as nine incised wounds on the neck, chest & backside of the body. He opined that the cause of death was due to hemorrhagic and shock on account of excessive bleeding due to cutting of jugular vein. He further opined that the death was homicidal in nature. The recovered weapons of offence were also sent to the Assistant Surgeon for his opinion and vide Exs.P-6, P-7 & P-8, he gave his opinion that the injuries in question which were present on body of Madkami Hadma could be caused by these weapons. Panchnama of the body (Ex.P-9) was prepared in presence of the witnesses and simple as well as blood stained soil were taken into possession by the I.O. from the place of occurrence.

4. After completion of the investigation, charge sheet was filed against the above four accused persons in the Court of Judicial Magistrate, First Class, Sukma, who in turn committed the case to the Sessions Judge, Jagdalpur, from where the learned Additional Sessions Judge received the case on transfer. The learned Additional Sessions Judge after hearing the Public Prosecutor and counsel for the accused and perusal of the record was of the opinion that prima facie offence under Section 302 read with Section 34 of the I.P.C. was made out against each of the accused persons. Accordingly, he framed the charge and read over to the accused persons, they denied the charge and claimed to be tried.

5. In order to prove the charge against the accused persons, the prosecution examined six witnesses. On the other hand, the statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the evidence of the prosecution and stated that they are innocent and have been falsely implicated in the crime. The learned Additional Sessions Judge after hearing the Additional Public Prosecutor and the counsel for the accused persons believing the prosecution evidence convicted and sentenced the accused persons in the aforesaid manner.

6. We have heard learned counsel for the accused/appellants and learned Government Advocate for the State/respondent.

7. As far as the question of the nature of death of Madkami Hadma being considered as homicidal, the same is not in dispute. In this connection, PW-4 Dr. S.S. Tekam, who conducted the post mortem on the body of Madkami Hadma, has been examined by the prosecution, he has stated that as many as nine incised wounds were found on the body of the deceased and these incised wounds were on the forehead, chest & neck, the clavicle bone was found fractured, the windpipe was found cut and the jugular vein was also found cut. All the injuries were anti-mortem in nature and cause of death was shock as a result of excessive bleeding. The nature of death was homicidal. Post-mortem report is Ex.P-5. Therefore, in view of the above evidence of the doctor, the nature of death of Madkami Hadma was homicidal.

8. Now, coming to the involvement of the accused persons in committing the murder of Madkami Hadma, the learned Additional Sessions Judge has convicted all the accused/appellants relying on the evidence of PW-1 Muchaki Budra, PW-2 Madkami Hidma & PW-3 Madkami Aayta. On close scrutiny of the evidence of PW-1 Muchaki Budra, it is clear that he was not an eyewitness to the incident. In his examination-in-chief as PW-1 he has tried to prove that he had witnessed the crime and he saw the accused persons assaulting the deceased, whereupon he lodged the report (Ex.P-1) and merg intimation (Ex.P-2). In the cross-examination he has stated that it is incorrect to say that he is giving false evidence and he had not witnessed the incident. On being confronted with his Police statement (Ex.D-1), he has stated that 'A' to 'A' portion of the Police statement (Ex.D-1) was not given by him, how the Police wrote this he does not know. Similarly, he has stated that the portion of merg intimation (Ex.P-2) from 'A' to 'A' was also not given by him. In his statement before the Police (Ex.D-1) this witness had stated that day before the incident (Friday) he went to Village: Rajamunda, came on Saturday morning and saw that Madkami Hadma was not at his residence, on enquiry Hidma & Aayta, the son of the deceased, informed him that when they were grazing bullocks they saw that Deva and others assaulted Hadma. Same thing was informed by him while giving the merg intimation (Ex.P-2) and F.I.R. (Ex.P-1) to the Police. In these statements he had not said that in

fact he witnessed the crime, whereas before the Court he exaggerated and made improvements to the effect that he had witnessed the crime. Therefore, his evidence is not trustworthy and does not inspire confidence, hence, no credibility can be attached to the evidence of this witness.

9. Now coming to the evidence of PW-2 Madkami Hidma, this witness has been declared hostile. In para 1 of his evidence he has stated that accused Deva committed the murder of Madkami Hadma, at that time he was at his residence, and the dispute took place between the deceased & Deva in the house of Deva which is at a distance of 100 meters from his residence. In para 2, he has stated that he knows Madkami Linge, on the date of incident he went to the house of Madkami Linge and at that place Aayta, son of the deceased, came and informed them about the incident. In the last para, he has stated that he had not seen the accused persons assaulting the deceased, therefore, his evidence is of no value.

10. Now, coming to the evidence of PW-3 Madkami Aayta, son of the deceased, he is a minor and at the time of giving evidence before the Court he was aged about 8 years. In order to test his ability to give evidence and to understand the Court proceedings, looking to his tender age and his rural background, the learned Additional Sessions Judge put certain questions to him through which the learned Additional Sessions Judge reached to the conclusion that he was not fit to administer the oath that is why his evidence was recorded without administering oath. As far as the value and reliability, which can be attached to the evidence of a child witness, as has been held by the Hon'ble Apex Court in the matter of **Panchhi and others v. State of U.P.** reported in **1998 CRI.L.J. 4044**, "evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy prey to tutoring". This witness in his examination-in-chief in para 1 has stated that the accused persons had murdered his father, he was grazing bullocks at the residence of Budra and at that time, the accused persons assaulted his father with axe. He further stated that when he was going to see his father, the accused persons were

(21)

assaulting his father, he ran away from there and reached the house and thereafter, he went towards the bullocks and informed Budra & Linge. In his cross-examination, he has stated that the house of Deva where the incident took place is 200-300 meters away from the house of Budra, where he was grazing bullocks, there is a kitchen garden of 6 ft. on four sides of the house of Deva, and at that time, Muchaki Budra came and informed him that Deva has murdered his father. On receiving this information, when he went to see his father, then he saw that his father was lying on the ground, no other person was present there and in the last line, he has categorically stated that he had not seen anybody assaulting his father. Therefore, the evidence of this child witness does not inspire confidence and based only on this evidence, the accused persons cannot be held guilty for committing the murder of his father Madkami Hadma, because in cross-examination, he has stated that Budra informed him about the murder of his father, then he went to see his father, whereas the merg intimation was given by Budra on the next day of the incident and in the same it was mentioned that on the date of the incident, Budra was not present in the village, he has gone to Village: Rajamunda. In the circumstances, giving information by Budra to this witness on the same day of the incident does not arise. In the last line of his evidence this witness himself has stated that he has not seen anybody assaulting his father. Perusal of his evidence shows that there is no consistency in his evidence rather his evidence is wavering. In such circumstance, no credibility can be attached to the evidence of this witness and it is not safe to hold the accused persons guilty of the murder of Hadma. Moreover, this witness has stated that he was grazing bullocks in the kitchen garden of Budra which was 300-400 meters away from the House of Madkami Deva and the incident took place in the house of Deva, therefore, there was no occasion for this witness to see the incident. As such, based on the evidence of this witness the accused persons cannot be held guilty for committing the murder of his father Madkami Hadma and there is no other ocular evidence.

11. As far as the recovery of axe and knife from accused Deva & Gangi is concerned, no Serologist's/F.S.L. report is produced by the

prosecution in order to prove that these weapons were stained with human blood and that too with the blood group of the deceased. Therefore, there is no evidence ocular or circumstantial, which connects the accused persons with the murder of Madkami Hadma. As such, we are of the considered view that the finding of the learned Additional Sessions Judge regarding the conviction and sentence of the accused/appellants cannot be sustained for the reasons mentioned above as the same is based on no legal or cogent and reliable evidence. Virtually there is no evidence at all which connects the accused persons with the murder of Madkami Hadma.

12. In the result, all the appeals of the appellants succeed and the same are allowed. Their conviction and sentence under Section 302 read with Section 34 of the I.P.C. are set aside and they are acquitted of the above charge. The appellants are directed to be released forthwith, if not required in any other case.

Sd/-
Chief Justice

Sd/-
L.C. Bhadoo
Judge

Some